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In the Supreme Court of the United States
OCTOBER TERM, 1986

LASCO LAVAUN HURT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a search warrant authorizing the seizure of material depicting persons under the age of 16 engaging in sexually explicit conduct is sufficiently particular to satisfy the requirements of the Fourth Amendment.
2. Whether a warrant may be issued for the search of a private residence for evidence of the receipt of non-mailable obscene material depicting children engaged in sexual activity.

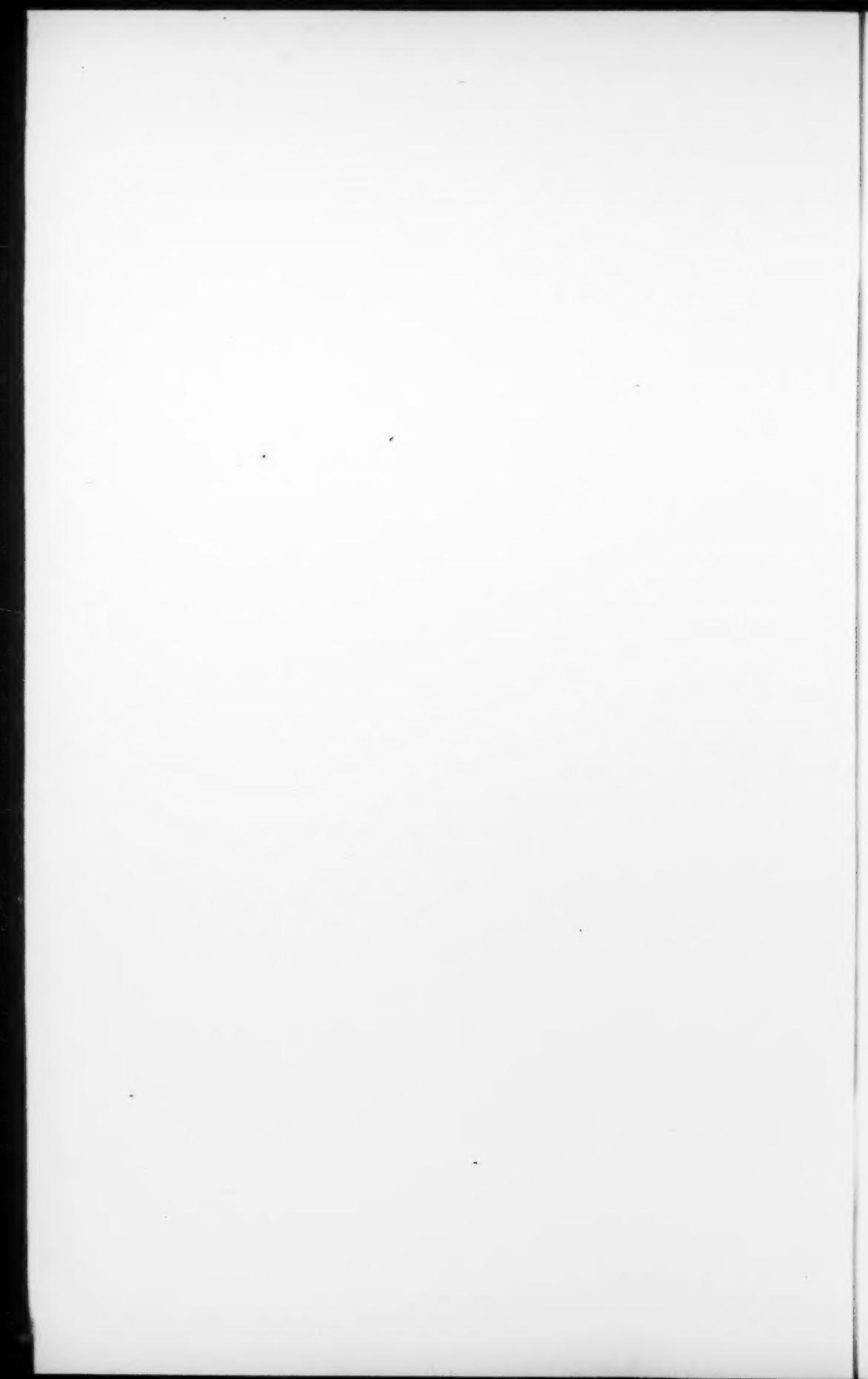


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*ON PETITION FOR A WRIT OF CERTIORARI TO THE
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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1, at 1-44) is reported at 795 F.2d 765. An amendment of the opinion of the court of appeals (Pet. App. A-2, at 1-4) is reported at 808 F.2d 707.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1986. The opinion was amended and a petition for rehearing was denied on January 20, 1987. The petition for a writ of certiorari was filed on March 13, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the District of Oregon, petitioner was convicted on two counts of using the United States mails for the

delivery of nonmailable matter, in violation of 18 U.S.C. 1461. He was sentenced to five years' imprisonment, a \$10,000 fine, and a five year term of probation.

1. a. The evidence at trial showed that on or about September 1, 1983, petitioner ordered from Stockholm, Sweden, three films depicting children engaged in sexually explicit conduct. On December 21, 1983, he received the films at his residence. Pet. App. A-1, at 3-4, 6.

The films had been viewed by United States Customs mail technicians upon their arrival at the international mail facility in Oakland, California, on December 7, 1983. Based on the fact that the films depicted children engaged in sexually explicit activity, a search warrant was obtained by Customs agents for petitioner's residence. In addition to authorizing a search for and seizure of the three films, the warrant authorized a search for two other categories of "fruits, instrumentalities, and evidence" of offenses of importation and interstate transportation of child pornography: "[b]ooks, magazines, photographs, negatives, films, and video tapes depicting minors (that is, persons under the age of 16) engaged in sexually explicit conduct" and "[c]orrespondence and records of any kind reflecting the ordering, receipt, shipping, and payment for child pornography" (E.R. 13).¹

The warrant was executed 30 minutes after the controlled delivery of the films (Pet. App. A-1, at 6). After petitioner was read his *Miranda* rights, he told a Customs Service special agent that the films were on the coffee table. In response to the special agent's question about where he kept his pornography, petitioner took the officers to his bedroom and opened a closet, which contained about 18 films, albums, and books showing or describing minors engaged in sexually explicit conduct. *Id.* at 7-8. The

¹ "E.R." refers to the Excerpt of Record filed in the court of appeals.

officers also found the packages the three films had arrived in as well as a receipt for a money order that petitioner told the officers he had used to buy the films (*id.* at 7).

At trial, the government introduced in evidence several other items seized at petitioner's residence in order to prove that he knew the nature of the three films he had received from Europe. This evidence included a sex education book containing loose cutout photos of child obscenity (Tr. 34-35; GX 7), two magazines depicting preteenage girls in sexual poses or engaged in sexual acts with adults (Tr. 37; GXs 9, 10), and a homemade photo album containing photos and magazine cutouts of minors engaged in sexual activities (Tr. 36; GX 8). Some of the films seized after petitioner pointed them out proved not to contain pictures of children under 16 engaged in sexually explicit conduct and were not introduced in evidence.

b. Before trial, petitioner filed a motion to suppress the films on the grounds, among others, that they were seized pursuant to a general search warrant and that he had a right under the First Amendment to receive them (E.R. 9-11, 20).² The district court denied the motion (Pet. App. A-3, at 1-7; E.R. 22-23).

2. The Ninth Circuit affirmed as to the first count of the indictment and reversed as to the second, finding it duplicative of the first.

With respect to petitioner's Fourth Amendment claim, the court of appeals held that the warrant did not offend

² The motion to suppress did not, by its terms, apply to the three films that were the subject of the indictment, but only to other materials "depicting minors *** engaged in sexually explicit conduct." The warrant specifically listed the films that were the subject of the indictment separately from the more general language, which petitioner quoted in his motion to suppress. E.R. 9. However, the district court apparently treated the challenge as a claim that all the evidence was seized pursuant to a general warrant (E.R. 4-6).

the Fourth Amendment's prohibition against general warrants. The court found that the description of materials "depicting minors (that is, persons under the age of 16) engaged in explicit sexual conduct" was a sufficiently particular description of the materials to be seized and therefore did not authorize a general search. Pet. App. A-1, at 24-27. The court of appeals also rejected petitioner's claim that his constitutional right to possess obscenity included the right to receive the material. In so ruling, the court relied in part on this Court's decisions in *United States v. Orito*, 413 U.S. 139 (1973), and *United States v. 12 200-ft. Reels of Super 8mm Film*, 413 U.S. 123 (1973).

Petitioner sought rehearing en banc, challenging primarily those portions of the search warrant relating to evidence other than the three films that were the subject of the indictment. He claimed that the warrant was similar to that found invalid in *United States v. Hale*, 784 F.2d 1465 (9th Cir. 1986), cert. denied, No. 85-2148 (Oct. 6, 1986). The warrant in *Hale* authorized the seizure of items that depicted "obscene, lewd, lascivious or indecent sexual conduct" (784 F.2d at 1468). The court of appeals denied the petition and amended its opinion to state explicitly that the description in the warrant was constitutionally acceptable because, in contrast to the case of materials described as "obscene," "[a]ny rational adult person can recognize sexually explicit *conduct* engaged in by children under the age of 16" (Pet. App. A-2, at 3-4 (emphasis in original)).

ARGUMENT

1. Petitioner contends (Pet. 12-17) that the language in the warrant authorizing the seizure of material portraying "minors (that is, persons under the age of 16) engaged in sexually explicit conduct" is not sufficiently particular to

satisfy the Fourth Amendment. He claims a conflict between the decision below and the decision of the First Circuit in *United States v. Diamond*, 808 F.2d 922 (1987) (advance sheets).

There is, however, no longer a basis for that claim. The First Circuit granted the government's petition for rehearing en banc in *Diamond* and withdrew the panel decision (see 808 F.2d at 923 note) (permanent bound volume). On June 1, 1987, the First Circuit reversed the district court's suppression order and remanded the case for further consideration. *United States v. Diamond*, No. 86-1380.

In *Diamond*, the district court had granted a pretrial motion to suppress 13 videotapes and other evidence obtained pursuant to a search warrant authorizing the seizure of videotapes "depicting prepubescent children or children under the age of 18 years involved in sexually explicit conduct." The district court found that the warrant gave searching officers discretion to determine whether the individuals depicted were younger than 18. *Diamond*, slip op. 2. The unanimous en banc First Circuit reversed and remanded for further proceedings. The court of appeals directed the district court to determine whether the videotapes each had at least one scene involving prepubescent children as opposed to other children under the age of 18. As to videotapes depicting prepubescent children, the en banc court found it clear that "there could be no successful motion to suppress based on improper discretion allowed a seizing officer" (*id.* at 5-6), because the description in the warrant of "prepubescent children" was objective and hence constitutionally sufficient. The court decided that it did not need to reach the question whether the reference to children under the age of 18 was particular enough (*id.* at 6-7).

Apart from the now-mooted claim of conflict with the *Diamond* case, the Ninth Circuit's decision in this case is not in conflict with any decision of this Court or any other

court of appeals. The language of the warrant meets the purposes of the particularity requirement: to prevent a general search of the premises and to restrict the discretion of the officer as to what to seize. See *Stanford v. Texas*, 379 U.S. 476, 485 (1965); *Marron v. United States*, 275 U.S. 192, 196 (1927); see generally 2 W. LaFave, *Search and Seizure* § 4.6 (1987). The description in the warrant was as precise as it could reasonably be in order to include all the materials properly subject to seizure. Thus, the warrant directed the seizure of all materials depicting persons under the age of 16 engaged in "sexually explicit conduct." The warrant then referred to the federal child pornography statute, which defines "sexually explicit conduct" with great specificity. See 18 U.S.C. (Supp. III) 2255(2). Petitioner suggests that the reference to persons under the age of 16 is inadequate to protect materials that are not within the prohibition of the child pornography statutes. The language in the warrant in this case provided as much guidance as could be expected—it is hard to imagine how the age of the subjects could be described in a way that would better ensure that only contraband would be seized without excluding a large quantity of potentially unlawful material from the reach of the warrant.

2. Petitioner contends (Pet. 18-26) that a warrant may not issue to search a private residence for evidence of receipt of illegally mailed material, where possession of the material in a residence is protected under *Stanley v. Georgia*, 394 U.S. 557 (1969).³ This claim is without merit.

In *Stanley*, the Court struck down a statute criminalizing the simple possession of obscenity in the privacy of a person's residence. The basis for the Court's holding lay in

³ In the courts below, this argument was raised as an attack on the sufficiency of the indictment, rather than an attack on the propriety of issuing a warrant (Pet. C.A. Br. 5-20; Pet. App. A-1, at 18-23).

Stanley's First Amendment right to privacy—his "right to satisfy his intellectual and emotional needs in the privacy of his own home" (394 U.S. at 565). See *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971) (plurality opinion) ("Stanley's emphasis was on the freedom of thought and mind in the privacy of the home."). Nothing in *Stanley* accorded obscene materials or child pornography any independent protection under the First Amendment. See, e.g., *United States v. Orito*, 413 U.S. 139, 141-143 (1973). Indeed, in *Stanley* itself the Court recognized that the government retains broad authority to regulate obscenity. See 394 U.S. at 568. The Court recognized that some of its previous decisions upholding such regulation had involved the mailing of obscenity (394 U.S. at 561 & nn.5, 6). More recently the Court has reaffirmed the limited scope of the decision in *Stanley*. In *United States v. Orito*, 413 U.S. at 142-143, for example, this Court rejected a claim that the Constitution barred prosecution for transporting obscene material intended for the private use of the transporter. The Court stated (413 U.S. at 143):

[W]e cannot say that the Constitution forbids comprehensive federal regulation of interstate transportation of obscene material merely because such transport may be by private carriage, or because the material is intended for the private use of the transporter.

Similarly, in *United States v. 12 200-ft. Reels of Super 8mm Film, supra*, this Court upheld a border seizure of allegedly obscene material that was being imported for private, noncommercial use.

While Congress cannot constitutionally regulate the mere possession of obscene matter in the privacy of one's home, it can "declare it contraband and prohibit its importation," *United States v. Thirty-Seven Photographs*, 402 U.S. at 377, as well as its receipt through the mails, *United States v. Reidel*, 402 U.S. 351, 354-356 (1971), without

trenching on legitimate privacy rights. Thus, it is settled that the right to possess obscene materials in the home does not confer upon the possessor the right to order the materials from abroad and cause their importation through the mails.

Petitioner's reliance on *Stanley* is particularly unavailing with regard to the materials involved here. At issue in this case is the use of the mails to carry child pornography. This Court has recognized the compelling social interest in eliminating the sexual abuse and exploitation of children. The Court noted in *New York v. Ferber*, 458 U.S. 747, 757, 759 (1982), that "The prevention of sexual exploitation and abuse of children constitutes a government interest of surpassing importance" and that distribution of child pornography "is intrinsically related to child abuse" in that it preserves a permanent record of the child's participation in sexual activity. Because the distribution of that record increases the harm to the child, the Court observed that the distribution network for child pornography must be eliminated in order to control the sexual exploitation of children. 458 U.S. at 759. The compelling governmental interest in protecting children "afford[s] the State the leeway to regulate pornographic material, the promotion of which is harmful to children, even though the State does not have such leeway when it seeks only to protect consenting adults from exposure to such material" (*id.* at 776 (Brennan, J., concurring)). Because the balance of competing interests in the case of child pornography weighs so heavily in favor of the state, arguments as to the validity of the individual's privacy interest in the receipt of child pornography are even weaker than in the case of obscene materials featuring adult subjects.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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